Supreme Court, U.S.
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No. _____

IN THE UNITED STATES SUPREME COURT

GERALD W. LINDGREN,

v. *Petitioner*

GLACIAL PLAINS COOPERATIVE,

Respondent

Amended Petition for Writ of Certiorari to
the State of Minnesota Court of Appeals

PETITION FR WRIT OF CERTIORARI

Gerald W. Lindgren,
Petitioner *pro se*
30759 - 360th Ave.
Hancock, MN 56244

QUESTIONS PRESENTED

Did the state of Minnesota courts violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, making the due process guarantees of the Fifth Amendment applicable to Minnesota, in that a defendant in a tort action was denied a jury trial to determine issues of material fact, where the letter of the law and case law buttressing same, requires such?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Gerald W. Lindgren, was defendant in the Minnesota state trial court, appellant in the Minnesota court of appeals, and petitioner in the Minnesota supreme court.

Respondent, Glacial Plains Cooperative, was plaintiff in the Minnesota state trial court, appellee in the Minnesota court of appeals, and respondent in the Minnesota supreme court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner seeks this Court's review of the opinion issued by the State of Minnesota

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OPINION AND JUDGMENT BELOW

This matter arises out of a tort action filed by Plaintiff/Appellee, Glacial Plains Cooperative, against Defendant/Appellant, Gerald W. Lindgren ("Mr. Lindgren"), in a Minnesota District Court and invoking Minnesota substantive law.

The Minnesota District Court for the Eighth Judicial District granted an order for summary judgment in favor of Plaintiff and against Defendant, which was appealed to the Minnesota Court of Appeals.

The Minnesota Court of Appeals, in its published decision, remanded the case in part to the District Court for further proceedings, so as to afford a trial to determine unresolved factual issues. See App. 14. The most important unresolved factual issues include the following:

(1) whether Mr. Lindgren is a "Merchant," as that term is defined in the Minnesota Uniform Commercial Code, when he is actually a farmer selling his crops; and,

(2) if Lindgren was indeed a "Merchant" as a matter of Minnesota law, what the correct amount of damages owing to Plaintiff Glacial Plains was, taking into consideration Plaintiff's failure to mitigate its damages.

Upon remand, the Minnesota trial court failed to try the matter in keeping with the remand decision of the Minnesota Court of Appeals, thereby giving rise to Defendant's initiation of further proceedings in the Minnesota Court of Appeals.

On August 24, 2010, the Minnesota Court of Appeals, in Case No. A10-185 (an unpublished opinion), embellished that portion of its original decision that was originally upheld; however, despite having specifically cited *Melford v. Adee,* 452 F.3d 956 (8th Cir. 2006), in its earlier order for remand as the rationale for a fact-finder to determine the facts of the case, the Court did not address the district court's failure to hold a trial to determine such material facts on remand, including those listed above.

After this second adverse state appellate decision, Lindgren filed a petition for certiorari before the State of Minnesota Supreme Court. Said Petition for Writ of Certiorari was denied in a one-sentence ORDER dated November 16, 2010. See App. 44.

This Petition for Writ of Certiorari is timely filed with this United States Supreme Court, in keeping with USSC Rule 13, in that it was filed within ninety (90) days of the decision of the Minnesota Supreme Court denying a petition for writ of certiorari. This version of the original petition is an amendment of the original petition, and is timely submitted.

STATEMENT OF JURISDICTION

The Minnesota Supreme Court, in its ORDER dated November 16, 2010, denied a petition for discretionary review of the Minnesota Court of Ap-

peals' decision dated August 24, 2010. (App. 44 and App. 29, respectively]. The United States Supreme Court thus possesses jurisdiction under Title 28 U. S.C. § 1257(a), because the Petition was filed within 90 days of the Minnesota Supreme Court's Order of November 16, 2010. See also, Sup. Ct. Rule 13(1) (a petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review); and, Sup. Ct. Rule 13(3) (if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing).

CONSTITUTIONAL PROVISION INVOLVED

Section (1) of the Fourteenth Amendment to the United States Constitution provides:

> *Section 1.*
> "*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" [Emphasis added]

See also, *Societe Internationale Pour Participations Industrilles et Commerciales, S.A. v. Rogers*, 357 U. S. 197, 210 (1958) ("*...there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of this cause....*") (citing Fifth Amendment concerns)

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Gerald Lindgren is a farmer who entered into a series of oral agreements to sell grain to Minnesota District Court Plaintiff Glacial Plains Cooperative. Glacial Plains sued Lindgren after two of the alleged contracts were not fulfilled due to intervening and mitigating circumstances, including a drought. Lindgren, acting *pro se*, asserted a defense under the statute-of-frauds provision included in the sales section of Minnesota's Uniform Commercial Code (UCC), M.S.A. § 336.2-101-336.2-725.

Glacial Plains moved for summary judgment, which the district court granted. However, the district court rejected Lindgren's Minnesota statute-of-frauds defense finding, as a matter of law, that he was a "merchant" and that the oral agreements were therefore enforceable because Lindgren had not objected to them within ten days. See M.S.A. § 336.2-201(2) (defining merchant exception to UCC statute of frauds).

The district court's finding that Lindgren was a merchant was necessary not only to its conclusion that the statue of frauds did not apply to bar Glacial Plains' claim, but also to its conclusion that attor-

ney-fee obligations included in the unsigned written contracts were enforceable additional terms to the oral agreements. See M.S.A. § 336.2-207(2) (providing circumstances under which additional terms in confirmatory memoranda become incorporated into contract between merchants).

Lindgren appealed, challenging the summary judgment on the basis that Glacial Plains' claims were barred by the statute of frauds, and disputing the damages assessed against him by the district court. *Glacial Plains Coop v. Lindgren*, 759 N.W.2d 661, 664-65 (Minn. App. 2009) (*Glacial Plains I*).

Lindgren argued that the district court erred by determining that he is a merchant under the UCC and therefore, finding the oral agreements enforceable. Lindgren further challenged that the damage award was error, in that the Plaintiff failed to mitigate its damages.

REASONS FOR GRANTING WRIT

On or about April 20, 2006, Petitioner Lindgren entered into an oral agreement with Mr. Keith Bebler, a professional grain marketer employed by Glacial Plains Cooperative. These oral agreements took the form of oral contracts whereby Lindgren was to sell specified quantities of corn to Glacial Plains. Glacial Plains sent out written versions (with additional terms) of those oral agreements to Lindgren, which Lindgren never saw until about six months after the oral agreements had been made. Neither Mr. Bebler nor any other employee of Glacial Plains bothered to contact Lindgren as to the disposition of said contracts until mid October of 2006, probably in contemplation of litigation.

Glacial Plains filed suit against Lindgren, claiming financial losses due to Lingren's alleged failure to provide the quantity of corn that was agreed to in said oral contracts. The amount of these alleged damages to Glacial Plains have never been properly calculated, and were never determined by a jury, thereby resulting in the denial of due process.

The initial decision of the Minnesota Court of Appeals states quite simply:

> *"We affirm the district court's decision with respect to denial of appellant's statute of frauds defense and remand for further proceedings. See Melford, 452 F.3d at 964 (meeting the statute of frauds does not prove the terms of the contract but merely allows a fact-finder to determine the issue). Affirmed in part and remanded."*

As such, it is clear that the Minnesota Court of Appeals intended to remand the case for the determination of factual issues, *e.g.*, a determination of the damages that would be due and owing to Glacial Plains, taking into consideration mitigating circumstances. The language of said *Melford* case upon which the Minnesota Court of Appeals relied makes this clear.

The *Melford* court stated, *inter alia*:

> *"Whether the parties have satisfied the statute of frauds is a question of law. * * * To submit the claim to a jury, the district court must determine if a 'writing indicates an actual transaction.' * * * Once the court has made this preliminary determination, a jury determines*

> *whether the parties 'actually entered' into the contract."*

and:

> *"Once the merchant's exception has been satisfied, the district court may submit the evidence of the contract to the jury so the jury can determine its existence and the terms. * * * [M]eeting the statute of frauds does not prove the terms of the contract;* ***meeting the statute of frauds allows a jury to determine the issue.***" [Emphasis added]

And it is precisely these issues — *i.e.*, "terms" including mitigating factors — that a jury must consider, if the ends of justice are to be met.

Among the factors requiring thoughtful consideration is the good faith, or lack thereof, on the part of Glacial Plains, as well as the extent of any efforts on their part to mitigate their alleged losses on the oral agreements, so as to determine a correct sum certain, in keeping with the law, *e.g.*, contract law, the UCC, and case law. This factual determination has never taken place, thereby depriving Lindgren of his property without due process of law, hence necessitating this petition.

With respect to the lack of good faith on the part of Glacial Plains, the following circumstances demonstrate the necessity of fact-finding.

Starting in mid-May of 2006, at the very beginning of the growing season, a drought occurred, causing the water in Mr. Lindgren's wells to recede to dangerously low levels, impacting Lindgren's potential ability to produce a satisfactory corn crop.

These wells were necessary to water a major portion of his crops; and this lack of water had the potential of making it impossible to fulfill the terms, in whole or in part, of the alleged contracts that Mr. Lindgren had with Glacial Plains.

In good faith and with due diligence, on June 20, 2006, Mr. Lindgren informed Glacial Plains of this unfortunate turn of events, explaining the severity of the drought in person in the office of Mr. Keith Bebler. Mr. Bebler did not want to accommodate Lindgren's request to exit these alleged contracts.

While waiting in Mr. Bebler's office on June 20, 2006, Mr. Lindgren noticed on the bulletin board at Glacial Plains' offices that corn had gone down in price. This provided the ideal opportunity for Glacial Plains their alleged obligation with the Chicago Board of Trade. If Mr. Bebler would have simply liquidated Glacial Plains alleged position on the Chicago Board of Trade on June 20, 2006 in line with what Mr. Lindgren had requested, Glacial Plains would have eliminated any loss and actually profited considerably. It would have been proper for a fact-finder in calculating damages, in keeping with the *Melford* case cited by the Minnesota Court of Appeals in its decision, to consider Mr. Bebler's intransigence with respect to the termination of the agreements.

The *Melford* court also referred to M.S.A. § 336.2-615, which states in part:

> "*Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:*
>
> *(a) a delay in delivery or nondelivery in whole or in part by a seller who complies*

> *with paragraphs (b) and (c) is not a breach of duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."*

Thus, under M.S.A. § 336.2-615, commercial impracticability — because of unforeseen circumstances such as the onset of the drought in the summer of 2006 which caused Lindgren's irrigation wells to eventually dry up, adversely affecting his crops — excuses performance of both parties to the contract. See *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 658 (Minn.1978).

Yet, instead of mitigating its losses at the time Mr. Lindgren warned that the drought might prevent him from fulfilling the contracts, Mr. Bebler waited until December 14, 2006, when Glacial Plains allegedly bought back on the Chicago Board of Trade the quantity of corn called for in the alleged contracts with Mr. Lindgren, at a much higher price per bushel. Clearly, Mr. Bebler failed to mitigate Glacial Plains' losses on these alleged contracts, resulting in a judgment in the Minnesota district court of $113,721.68, which was most unjust.

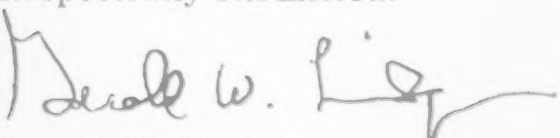
Surely, in the interest of justice, and in keeping with the constitutional guarantees of due process, a jury trial should have been afforded in order to con-

sider such factors in determining the proper amount of damages, in keeping with the instructions of the Minnesota Court of Appeals in its order for remand. And it is this very concept of justice that the *Melford* case referred to, when it said that a jury is warranted to determine factual issues so as to determine, *inter alia*, just damage awards. Such a just determination would, of course, take into consideration the aforementioned mitigating circumstances — *i.e.*, bad faith and lack of mitigation — which must necessarily enter into the equation of determining damage awards.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted.



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STATE OF MINNESOTA
COUNTY OF SWIFT
DISTRICT COURT
EIGHTH JUDICIAL DISTRICT

Court File No. 76-CV-07-237

Glacial Plains Cooperative,
Plaintiff,

vs.

Gerald Wayne Lindgren,
Defendant.

SUMMARY JUDGMENT ORDER

The above-entitled matter came on for a hearing on Plaintiff's motion for summary judgment before the undersigned Judge on December 17 2007 at the Swift County Courthouse, Benson, Minnesota. Plaintiff appeared in person and was represented by Amy J. Doll, Attorney at Law, Morris, Minnesota. Defendant appeared in person and represented himself.

UNDISPUTED FACTS

Based upon the evidence before the Court, there are no genuine issues of material fact present in this case. Gerald Lindgren, the defendant herein, has been running his own farming operations since 1973. [Gerald Lindgren Deposition at 9]. He grew up on a farm and took agricultural and business classes while in college. [*Id.* at 7-9]. The defendant

makes all of the marketing decisions regarding the farm. [*Id.* at 10; Anita Lindgren Deposition at 8]. The defendant originally grew corn, soybeans, and wheat on cropland that he both owned and rented. [Gerald Lindgren Deposition at 13-14]. He stopped renting cropland sometime in the 1990's and continued to grow corn and soybeans on the 836 acres of land that he owned. [*Id.* at 13-14]. The defendant has therefore been a grain farmer for approximately 35 years.

The defendant owns 6 conventional grain storage bins, with a total holding capacity of approximately 60,000 bushels of grain. [*Id.* at 16-17, 60-61]. He also has temporary storage that can hold approximately 100,000 bushels of grain. [*Id.*]. The defendant prefers having all six of his grain storage bins full. [*Id.* at 18-19]. Usually the defendant keeps about 10,000 bushels of soybeans in storage, with the rest being corn. [*Id.* at 59-60].

The defendant irrigates approximately 500 acres of the 836 he owns. [*Id.* at 41]. The remaining land that is not irrigated is of a different type of soil that does not need to be irrigate. [*Id.* at 42]. In 2006, approximately 330 of the irrigated acres were planted with corn and the remaining irrigated acres were planted with soybeans. [*Id.* at 41, 47-48, 51-52]. Of the land that is not irrigated, approximately 100 acres were planted with soybeans in 2006, and the remaining acres were planted with corn. [*Id.* at 58].

Throughout his years as a farmer, the defendant has chosen to sell his crops to several different grain elevators including Cenex Harvest States, Cargill, and Glacial Plains. [*Id.* at 11-112, 62-63; Exhibit 7]. The defendant has also entered into contracts with Cenex Harvest States, Cargill, and Glacial Plains.

[Gerald Lindgren Deposition at 62-63, 66; Exhibits 2 and 7]. The defendant has had one prior experience when he did not fulfill a grain contract. [Gerald Lindgren Deposition at 22-23]. In 12995, the defendant entered into a hedge-to-arrive contract with Cenex Harvest States. [*Id.*]. At the time the defendant was scheduled to deliver the corn under the contract, the market had fallen from $2.45/bu to $0.92/bu, and he therefore refused to deliver the corn. [*Id.*]. Cenex brought an action against the defendant; the case eventually settled. [*Id.*].

On April 20, 2006, the defendant orally agreed to deliver corn and soybeans to Plaintiff. [Gerald Lindgren Deposition at 31-32, 71-75]. On that date the defendant spoke to Keith Bebler from Glacial Plains and the two worked out a deal for defendant to deliver 9,000 bushels of #1 yellow soybeans to Plaintiff with a delivery date of September/October 2006 at a price of $5.35/bu.; 10,000 bushels of #1 yellow soybeans to Plaintiff with a delivery date of September/October 2006 at a price of $5.35/bu.; 65,000 bushels of #2 yellow corn to Plaintiff with a delivery date of October/November 2006 at a price of $2.09/bu.; and 30,000 bushels of #2 yellow corn to Plaintiff under a Hedge to Arrive contract with a delivery date of October 1-December 31, 2007 at a price of $2.86/bu. [Gerald Lindgren Deposition at 31; Aff. of Bebler at 1]. Thereafter, on April 20, 2006 four confirmatory contract, all signed by Keith Bebler, were mailed to the defendant. [Aff. of Bebler at 1]. The contracts were numbered 18346 (65,000 bu. corn), 18347 (9,0000 bu. soybeans, 18348 (10,000 bu. soybeans), and Hedge-to-Arrive. [Exhibits 3, 5, 6, and 4 of Bebler Aff.]. The defendant does not recall when he received the documents in the mail, and he did not

open the envelope containing the contracts until October of 2006. [Gerald Lindgren Deposition at 71-75]. The defendant did not sign the contracts. [Exhibits 3, 4, 5, and 6; Gerald Lindgren Deposition at 71]. The defendant now claims that because the contracts were not signed by him, they are not enforceable against him. [Gerald Lindgren Deposition at 78-80].

The defendant fully performed on contracts 18347 and 18348, for the soybeans. [*Id.* at 56]. The soybeans were delivered on time to Glacial Plains. [*Id.*]. The defendant delivered a total of 724.68 bushels of corn to Glacial Plains in September and October 2006 which Plaintiff applied to contract #28346. [*Id.* at 85; Exhibits 10, 11; Exhibit C]. Defendant did not perform on the hedge-to-arrive contract, and stated his intention to not perform on that contract at his deposition on August 29, 2007. [*Id.* at 85-86].

Each numbered contract also provided, "In the event of default of seller in seller's performance of this contract, seller agrees to pay all costs of buyer's enforcement of this contract, including, but not limited to, reasonable attorneys fees and court costs." [Exhibit 3 of Bebler Aff.]. However, the Hedge to Arrive contract does not contain language regarding payment of enforcement costs in the event of a default. [See Exhibit 4 of Bebler Aff.]. Defendant disagrees with some of the additional language in each contract, but agrees with the material terms of the sale including the date, name of buyer, name of seller, type and grade of commodity, number of bushels, price per bushel, and delivery date. [Gerald Lindgren Deposition at 71-72].

In June 2006, the defendant became concerned

with his crop potential because a drought. [Id. at 33]. The defendant met with Keith Bebler, Merchandising Manager for Glacial Plains, to try to "close out" the contracts. [*Id.* at 33-34; Ex. 1, pg. 1]. The defendant wanted the corn contracts nullified that day, but Mr. Bebler stated "we want the corn." [Gerald Lindgren Deposition at 34-37]. Later that day Mr. Bebler called the defendant and offered to buy him out at a price of $0.37 per bushel. [*Id.* at 37-38]. The defendant rejected this offer. [Id. at 38-39].

Defendant also called Mr. Bebler in July and August to express his concern about losing his crop in the drought; Mr. Bebler told the defendant that Glacial Plains wanted the corn. [Id. at 40, 45-46]. The delivery date for the 65,000 bushels of corn in the Delivery Contract (number 18346) was October through November 2006. [Exhibit 3]. In late August, the defendant's crop received enough rain that he was able to stop irrigating, and he harvested between 50,000 and 60,000 bushels of corn during the 2006 harvest season. [*Id.* at 42-43, 51-52, 54-55]. Of that harvested corn, the defendant delivered a total of 724.68 bushels to Glacial Plains in September and October 2006, which Plaintiff applied to contract number 18346. [*Id.* at 85; Exhibits 10 and 11; Exhibit C].

Defendant sold approximately 50,000-60,000 bushels of his 2006 corn to Cargill in November 2006, plus an additional 62,500 bushels of his stored corn was also sold to Cargill in the fall of 2006. [Gerald Lindgren Deposition at 54-56; Exhibit 8]. The defendant did not deliver to Plaintiff the outstanding 64,275.32 bushels on the Delivery Contract #18346 by November 30, 2006. [Gerald Lind-

gren Deposition at 35; 77]. The defendant received $161,816.22 from Cargill for the bushels of corn delivered in November 2006 [*Id.* at 54-55; Exhibit 8]. Plaintiff covered the Delivery Contract (Contract 18346) on December 1, 2006, at a cost of $3.44 per bushel. [Exhibit 12; Aff. of Bebler].

Defendant fully performed on both soybean contracts (#18347 and #18348) that were entered into at the same time as the corn contracts, and contained virtually the same provisions. [Gerald Lindgren Deposition at 56-57]. Defendant's deposition was taken on August 29, 2007. [*Id.* at 1]. At the time of his deposition, Defendant stated he would not deliver corn on the Hedge-to-Arrive contract that was due between October 1, 2007 and December 31, 2007. [*Id.* at 85-86]. The defendant's correction page to his deposition was mailed on October 12, 2007 and received by Plaintiff's attorney on October 17, 2007. [See Ex. A, mailing page accompanying Lindgren deposition correction page]. Plaintiff then considered the Hedge-to-Arrive contract anticipatorily breached by the defendant, and Plaintiff covered its losses on October 18, 2007 at a cost of $3.65 per bushel for 30,000 bushels of #2 yellow corn. [Exhibit 13; Aff. of Bebler].

Pursuant to Minn. Stat. § 549.09, Plaintiff is entitled to prejudgment interest from the date of commencement of this action (March 14, 2007) to the date of judgment at the rate of 5% for dates in 2007 and 4% for dates in 2008.

Based on all of the files, records, and proceedings herein, the Court sets forth the following:

CONCLUSIONS OF LAW

1. Summary judgment is granted if there is no dis-

pute as to a genuine issue of material fact.
2. When a motion for summary judgment is made, the evidence is viewed in the light most favorable to the non-moving party.
3. Defendant is a "merchant" as defined by the Uniform Commercial Code.
4. Four contracts existed between Plaintiff and Defendant. Defendant breached contracts number 18346 and Hedge-to-Arrive. Defendant fully performed on contracts 18347 and 18348.

ORDER

1. Plaintiff's motion for summary judgment is GRANTED.
2. Judgment in that amount of $113,721.68 is entered for the Plaintiff.
3. Plaintiff's motion for attorney's fees is GRANTED.
4. Plaintiff has 30 days from the date of this order to submit and affidavit for attorney's fees. Upon receipt, the court will enter a supplementary judgment for reasonable attorney's fees.
5. The memorandum of law is incorporated by reference.

IT IS SO ORDERED.

Dated: January 30, 2008

David L. Mennis
Judge of District Court

MEMORANDUM OF LAW

Summary Judgment

A court may render summary judgment when there is no genuine issue of material fact and where a determination of the applicable law will resolve the controversy. *Gilcrest v. Perl*, 363 N.W.2d 904 (Minn. Ct. App. 1985), *aff'd* 387 N.W.2d 412 (Minn. 1986); Minn. R. Civ. P. 56.03. The trial court must view a motion for summary judgment in a light most favorable to the non-moving party. *Padco, Incl v. Kinney and Lange*, 449 N.W.2d 889 (Minn. Ct. App. 1989). Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to that party's case. *Rouse v. Dunkley & Bennett*, 520 N.W.2d 406 (Minn. 1994) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Here, defendant has failed to demonstrate that there is a genuine issue of material fact.

Merchant

Minn. Stat. §336.2-104 defines a "merchant" as

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Here, the defendant has been running a grain

farm operation for approximately 35 years. Defendant raises grain commodities and sells them. He is the only one who performs the marketing for his farm commodities. The defendant has entered into contracts to sell corn and soybeans on numerous occasions and has dealt with Plaintiff in the past regarding selling grain. Defendant meets the definition of merchant, as defined above. Plaintiff is a company that operates in the buying of grain from farmers. Plaintiff is also a merchant as defined above.

Confirmatory Document

Minn. Stat. §336.2-207 describes when additional terms become part of a contract.

> A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

Minn. Stat. § 336.2-207(1). Here, Plaintiff mailed out the written contracts on April 20, 2006, the same day Plaintiff and the defendant orally agreed to the terms of the contract.

> The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
> (a) The offer expressly limits acceptance to

the terms of the offer;
(b) They materially alter it; or
(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Minn. Stat. § 336.307(2). Here, additional terms were added to the contract from what was orally discussed between Plaintiff and the defendant. However, those terms became part of the contract because the offer did not expressly limit acceptance to the terms of the offer, the terms did not materially alter the contract, and the defendant did not object to the terms within a reasonable time. The defendant received the contracts sometime after April 20, 2006, but did not open them nor object to them until October 2006, a time at which performance under the contracts was to be taking place and after the defendant had delivered 724.68 bushels of corn to Plaintiff. Therefore, because the defendant did not timely object to the terms of the contract, all of the provisions of the contract have force and effect and may be used against the defendant, regardless of the fact that defendant did not sign the contracts. The defendant admits to receiving the documents. Defendant further agrees that the terms of the contracts relating to time for delivery, number of bushels to be delivered, and delivery price were correct. Even though the defendant did not sign the documents, they are still enforceable against him, and he was required to deliver the corn. Defendant breached contract number 18346 and the Hedge-to-Arrive contract, and judgment is entered for Plaintiff.

Plaintiff's Damages

Plaintiff's damages caused by defendant's breach of contract are calculated as follows:

64,275.32 bushels x $1.35/bu. overpayment for cover price =	$86,771.68
plus	
30,000 bushels x $0.79/bu. overpayment for cover price =	$23,700.00
less	
amount Plaintiff owes Defendant for corn delivered in Sept/Oct 2006	-$1,482.69
plus	
prejudgment interest at 5% 3-14-07 through 12-31-07 =	$4,374.49
plus	
prejudgment interest at 4% 1-1-08 through 1-30-08 =	$358.20
	$113,721.68

DLM

STATE OF MINNESOTA
COUNTY OF SWIFT
DISTRICT COURT
EIGHTH JUDICIAL DISTRICT

Court File No. 76-CV-07-237

Glacial Plains Cooperative,
Plaintiff,

vs. .

Gerald Wayne Lindgren,
Defendant.

ORDER FOR SUPPLEMENTARY JUDGMENT

The above-entitled matter came before the undersigned Judge on February 29, 2008. Based on the Court's review of the file, it hereby makes the following:

FINDINGS OF FACT

1. By order dated January 30, 2008, the Court issued Summary Judgment in favor of the Plaintiff and against Defendant, ordering judgment in the amount of $113,721.68.

2. In the same order the Court granted Plaintiff 30 days to submit an affidavit for attorney fees.

3. Plaintiff filed such affidavit for attorney fees on February 5, 2008 indicating total attorney fees in

the amount of $10,381.50.

4. The Court finds this amount of attorney fees to be reasonable.

5. The following costs should also be taxed against Defendant and in favor of Plaintiff:

Cost pursuant to Minn. Stat. 549.02	205.50
Process/Sheriff Service Fee	75.89
Court filing fee	250.00
Motion filing fee	55.00
Cost of deposition of Gerald and Anita Lindgren	540.20
Total	$1,126.59

Based on the foregoing findings, the Court makes the following:

ORDER

1. Plaintiff is entitled to a supplementary judgment against Defendant in the amoutn of $11,508.09.

2. This order constitutes the final judgment of the Court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 29, 2008

David L. Mennis
Judge of District Court

Court of Appeals of Minnesota.
GLACIAL PLAINS COOPERATIVE,
Respondent,
v.
Gerald Wayne LINDGREN,
Appellant.

No. A08-0279.
Jan. 27, 2009.

Amy Jo Doll, Fluegel Helseth McLaughlin Anderson & Brutlag, Morris, MN, for respondent.

Gerald W. Lindgren, Hancock, MN, *pro se* appellant.

Considered and decided by KLAPHAKE, Presiding Judge; LANSING, Judge; and WORKE, Judge.

OPINION

KLAPHAKE, Judge.

Gerald Wayne Lindgren, appearing *pro se*, appeals the grant of summary judgment to respondent Glacial Plains Cooperative that awards damages on two contracts for the sale of grain. Because the agreements in question fall within the admission **663* exception to the statute of frauds under the UCC and because we conclude that the UCC supersedes the general statute of frauds, we affirm in part and remand for further proceedings.

FACTS

On April 20, 2006, appellant, a farmer, agreed by telephone to sell grain to respondent, a grain eleva-

tor and marketer. The parties reached four essential agreements: (1) two agreements for delivery of 9,000 and 10,000 bushels of soybeans in October or November 2006; (2) one agreement for delivery of 65,000 bushels of corn in October or November 2006; and (3) one hedge-to-arrive agreement for the sale of 30,000 bushels of corn in the fall of 2007. Respondent immediately sent out four written contracts that included these terms, but the written contracts also added a provision for payment of attorney fees and costs.

Appellant did not look at the written contracts until October. By that time, appellant had fully performed on the two soybean agreements and had partially performed on the 2006 corn agreement by delivering 724.68 bushels of corn in September. However, in October, appellant located the four written contracts and decided that he was not obligated to perform because they were unsigned. Instead, he decided to sell his existing corn, both from his field and in storage, which could have satisfied the 2006 corn agreement with respondent, to another grain dealer. Respondent covered the 2006 contract in December 2006, paying a higher price for the corn, and later covered appellant's anticipatory breach of the 2007 hedge-to-arrive corn contract.

Respondent brought an action for breach of the 2006 and 2007 corn contracts. Appellant raised the defense of statute of frauds both under Minnesota's UCC provisions and under Minnesota's general statute of frauds which requires a written contract for any agreement that by its terms cannot be performed within one year. In granting respondent's motion for summary judgment on both corn con-

tracts, the district court concluded that appellant was a merchant within the meaning of the UCC and that the transactions fell within the merchant exception to the statute of frauds. The district court further concluded that since the parties are merchants, the UCC provision under Minn.Stat. § 336.2-207(1) dictated that the additional terms became part of the parties' contract because appellant did not object to the terms within a reasonable time and because the terms did not materially alter the contract. The district court entered judgment for respondent finding that, even though appellant did not sign the contracts, they are still enforceable against him under the UCC, and he was required to pay damages for failing to deliver the corn. The district court did not address whether appellant's documentary and in-court admissions constituted an exception to the UCC statute of frauds or whether the general statute of frauds applied.

ISSUES

1. Do the admission exception and the merchant exception operate to eliminate the UCC statute of frauds defense to oral agreements for the sale and delivery of grain?

2. Does the UCC statute of frauds provision govern to the exclusion of the general statute of frauds provision pertaining to a contract that cannot be performed within one year?

ANALYSIS

This court reviews a grant of summary judgment *de novo* to determine whether there is a disputed issue of material fact. **664 Zip Sort, Inc. v. Comm'r of*

Revenue, 567 N.W.2d 34, 37 (Minn.1997). A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal, the reviewing court must view the evidence in a light most favorable to the party against whom judgment was granted and resolve any doubts as to the existence of a fact issue against the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993).

I.

Appellant argues that the oral corn agreements are not enforceable because they violate the statute of frauds. Minnesota's version of the UCC provides that a contract for the sale of goods for the price of $500 or more is not enforceable "unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." Minn.Stat. § 336.2-201(1); *Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956, 961 (8th Cir.2006). "The primary purpose of the writing requirement in the statute of frauds is to demonstrate that a contract for sale has indeed been made." Casazza v. Kiser, 313 F.3d 414, 419 (8th Cir. 2002). "Whether the parties have satisfied the statute of frauds is a question of law." See *Melford*, 452 F.3d at 961-62.

Respondent argues that the oral agreements fall within two UCC exceptions to the statute of frauds: the admission exception and the merchant excep-

tion. The district court did not address the admission exception but found the merchant exception applicable. The party asserting the exception has the burden of proving its application. *Casazza*, 313 F.3d at 418.

The admission exception to the code's statute of frauds is found in Minn.Stat. § 336.2-201(3)(b), which provides that even when there is no signed writing sufficient to satisfy the writing requirement, the statute of frauds will not act to abolish the contract "if the party against whom enforcement is sought admits in pleading, testimony or otherwise in court that a contract for sale was made." The exception was created to reduce the risk of fraud: "Where the making of a contract is admitted in court, no additional writing is necessary for protection against fraud, and the contract becomes enforceable notwithstanding the provisions of the statute of frauds." 73 Am.Jur.2d Statute of Frauds § 478 (2008). The UCC comments further explain:

> If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section, it is no longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

Minn.Stat. Ann. § 336.2-201(3)(b) U.C.C. cmt., para 7 (West 2002).

Appellant has made such an admission here. During his deposition and in his summary judgment papers, appellant acknowledged that he made two oral agreements in April 2006 for the sale of corn to be delivered in 2006 and 2007, and that he operated under the assumption that he was obligated under these agreements throughout the summer of 2006. **665* He further admitted that he found the unsigned contracts, decided they were unenforceable, and stopped performing on the 2006 corn contract and never performed on the 2007 corn agreement. Appellant also set forth the specific terms to which the parties orally agreed in April 2006 in his opposition to summary judgment and argued that any additional terms should not be part of any agreement. Based on these admissions by appellant, we conclude that the admission exception applies here, removing the agreement from the UCC statute of frauds.

Several cases in this jurisdiction have addressed the admission exception under different scenarios. The Minnesota Supreme Court has held that in-court admissions are sufficient to defeat a claimed UCC statute of frauds defense, holding that a farmer orally admitted to entering into a contract for 10,000 bushels of corn. *Jurek v. Thompson*, 308 Minn. 191, 202, 241 N.W.2d 788, 793 (1976). The *Jurek* court did not address the merchant exception, but simply applied the admission exception. *Id.*; see also *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn.1985) (upholding oral modification to purchase agreement under admission exception to

statute of frauds). Applying Minnesota law, the Eighth Circuit Court of Appeals found that a honey producer admitted that it contracted for 18 loads of honey and that this admission constituted an exception to the statute under Minn.Stat. § 336.2-201(3)(b). *Melford,* 452 F.3d at 961 (noting a contract otherwise within the statute may be enforced against a person who admits a contract for sale was made, but not "beyond the quantity of goods admitted"). The *Melford* court also instructed that meeting the Minnesota statute of frauds does not prove the terms of the contract; meeting the statute of frauds simply removes the defense and allows a jury to determine the issue of whether the parties entered into an agreement and its terms. *Id.* at 961-62.

Cases from other jurisdictions have also applied the admission exception in facts similar to those presented here. In *Cargill Inc., Commodity Mktg. Div. v. Hale,* 537 S.W.2d 667 (Mo.App.1976), a plaintiff-elevator sued defendant-farmer for breach of contract to sell 9,000 bushels of soybeans. Because the business was transacted via telephone and followed up by written confirmation, defendant, as in the instant case, raised the statute of frauds as a defense. The Missouri Court of Appeals held that the defendant's testimony acknowledging the original oral agreement constituted an admission for the purposes of application of the statute of frauds. *Id.* at 669; see also *Lewis v. Hughes,* 276 Md. 247, 251-52, 346 A.2d 231, 233-34 (Md.App.1975) (holding that defendant's testimony, taken as a whole, clearly manifested an objective assent to a purchase offer, and that the parties disagreed only on the method of payment, not on the existence of an agreement); Quad County Grain, Inc. v. Poe, 202

N.W.2d 118, 119, 120 (Iowa 1972) (finding defendant's testimony as adverse witness was admission taking an oral contract for the sale of stored corn out of the statute of frauds).

Because the admission exception removes the UCC statute of frauds defense under the facts of this case, we decline to address whether the merchant exception also applies. See *Cargill,* 537 S. W.2d at 669 (choosing not to discuss whether a farmer was a merchant under the UCC because the admission exception disposed of the central issue on appeal).

II.

Appellant also argues that the hedge-to-arrive agreement for delivery of corn in 2007 was unenforceable under Minnesota's ***666** general statute of frauds, Minn. Stat. § 513.01 (2008), which requires every agreement that by its terms cannot be performed within one year be in writing and subscribed by the party charged. The hedge-to-arrive agreement entered into in April 2006 for the delivery of corn in the fall of 2007 could not be performed within one year, although it could be rolled forward for delivery on a later date. The question presented, then, is whether the UCC statute of frauds provision, section 336.2-201, exclusively governs agreements for the sale of goods or whether the general statute of frauds, section 531.01, also applies.

When two statutes conflict, the Minnesota legislature directs that the more specific provision controls over the general. Minn.Stat. § 645.26, subd. 1 (2008) (stating "[w]hen a general provision in a law is in conflict with a special provision in ... another law, ... the special provision shall prevail and shall

be construed as an exception to the general provision"). Section 336.2-201 is a special legislative attempt to tailor the enforcement and exceptions of the statute of frauds to the unique characteristics of a transaction for the sale of goods. Conversely, Minn.Stat. § 531.01 is the "general" statute of frauds provision historically encompassing a wide variety of contractual obligations. Because of Minnesota's policy of interpreting special statutes as exceptions to more general provisions, and because the transactions in question fall squarely within the scope of the sale of goods provisions of the UCC, the oral agreements need only satisfy the requirements of section 336.2-201. *See generally*, 2 Lary Lawrence, Lawrence's Anderson on the Uniform Commercial Code § 2-201:17 at 331, 2-201:78 at 361 (3d ed.2004) (noting that UCC "governs the sale of goods to the exclusion of a general statute of frauds").

This interpretation is consistent with the generally stated purpose behind the statute of frauds. See *Lunning v. Land O'Lakes*, 303 N.W.2d 452, 457 (Minn.1980) (concluding when application of statute of frauds will protect, rather than prevent, fraud, equity requires that doctrine of equitable estoppel be applied); *Doyle v. Wohlrabe*, 243 Minn. 107, 66 N. W.2d 757, 761 (1954) (stating that basic purpose of statute of frauds is to provide reasonable safeguards to insure honest dealing and it may not be used as an instrument of fraud); *Schaefer v. Thoeny*, 199 Minn. 610, 614-15, 273 N.W. 190, 193 (1937) (holding that equity will not permit statute of frauds to be used as means of committing fraud, since purpose of statute is to prevent fraud). Based on the specific facts of this case, we conclude that

the UCC provisions governing application of the statute of frauds control.

DECISION

We affirm the district court's decision with respect to denial of appellant's statute of frauds defense and remand for further proceedings. See *Melford,* 452 F.3d at 964 (meeting the statute of frauds does not prove the terms of the contract but merely allows a fact-finder to determine the issue).

Affirmed in part and remanded.

Minn.App.,2009.
Glacial Plains Co-op. v. Lindgren
759 N.W.2d 661, 67 UCC Rep.Serv.2d 877

STATE OF MINNESOTA
COUNTY OF SWIFT
DISTRICT COURT
EIGHTH JUDICIAL DISTRICT

Court File No. 76-CV-07-237

Glacial Plains Cooperative,
Plaintiff,

vs.

Gerald Wayne Lindgren,
Defendant.

ORDER

The above-entitled matter came on for a hearing before the undersigned Judge of the above named court, on July 29, 2009, on Defendant's motion to amend his Answer to include a counter-claim for breach of fiduciary duty. Amy Doll, Esq., represents the plaintiff. Douglas Kluver, Esq., represents the defendant. Based on the files and records herein and the arguments of counsel, the court makes the following:

Findings of Fact

1. This court's order granting Summary Judgment dated January 30, 2008, the order awarding plaintiff attorney's fees and costs dated February 29, 2008, the Court of Appeals Order dated April 22, 2008 (specifically acknowledging jurisdiction over the prior two orders), as well as the published opinion in *Glacial Plains Co-op. v. Lindgren*, 759 N.W.

2d. 661 (Minn. App. 2009) (which affirmed this court's summary judgment order "in part" and remanded this matter) are all incorporated by reference herein.

2. On January 30, 2008, this court granted summary judgment in favor of plaintiff. This court concluded that the UCC merchant exception to the one-year statute of frauds applied to defendant. The court concluded that defendant breached oral grain delivery contracts with plaintiff and that plaintiff was entitled to damages and prejudgment interest in the amount of $113,721.68. Judgment for this amount was ordered for the plaintiff against defendant. In the same January 30, 2008 order, this court also granted plaintiff's motion for attorney fees. No specific amount was ordered. Rather, the plaintiff was allowed 30 days to file an affidavit regarding the fees and a supplementary judgment would be ordered upon receipt.

3. After allowing time for counsel to submit an affidavit of costs and fees as the prevailing party, this court awarded plaintiff attorney's fees and costs totaling $11,508 on February 29, 2008. A supplementary judgment in such amount was ordered for plaintiff and against defendant.

4. On April 22, 2008, the Court of Appeals Order specifically stated that it accepted jurisdiction over the summary judgment entered on January 30, 2008 and the supplementary judgment entered on February 29, 2008.

5. On January 27, 2009, the Court of Appeals af-

firmed this court's summary judgment order "in part" and remanded this matter to the district court "for further proceedings." The Court of Appeals affirmed summary judgment on different grounds, citing the UCC admission exception to the one-year statute of frauds as the basis for its decision. The district court's judgments of January 30 and February 29, 2008 were not reversed or modified by the Court of Appeals.

6. The Court of Appeals provided no guidance or mandate in its remand to the district court. Thus, this court requested input from the parties as to how to proceed on remand. Neither party agreed on the course to be taken on remand so this court ordered the parties to attempt mediation. Mediation was unsuccessful.

7. The defendant's motion to amend his Answer to include a counter-claim for breach of fiduciary duty is the sole post-remand motion pending before the district court. Defendant claims that plaintiff had a duty to inform defendant that defendant had a right to breach or repudiate the grain delivery contract with plaintiff. Plaintiff's failure to do so allegedly constitutes a breach of fiduciary duty. Defendant asserts that the nature of the parties themselves (plaintiff as an experienced, savvy grain marketer and defendant as a mere unsophisticated farmer) gives rise to this duty.

8. Given the ample evidence on the record about defendant's vast experience with future grain delivery contracts and being the sole marketer of his grain, this court finds defendant's self-depreciating asser-

tions about his lack of sophistication in such matters to be self-serving and disingenuous. Furthermore, this court can find no legal basis for finding that a fiduciary duty arises from plaintiff to defendant under the circumstances, even if everything that defendant alleges is true.

9. Because the judgments of this court regarding the damages to plaintiff for breach of contract and for attorney's fees were not reversed or modified on appeal, the court finds that the prior judgments stand. Accordingly, defendant's motion to amend his Answer to include a counter-claim for breach of fiduciary duty must go denied as untimely because judgment has already been entered and said judgments were not reversed on appeal.

CONCLUSIONS OF LAW

1. A trial court's duty on remand is to execute the mandate of the remanding court strictly according to its terms. *Duffey v. Duffey*, 432 N.W. 2d473, 476 (Minn. App. 1988). When the trial court receives no specific directions as to how it should proceed in fulfilling the remanding court's order, the trial court has discretion in handling the course of the cause to proceed in any manner not inconsistent with the remand order. *Id.*

2. In this case, the court concludes that the prior orders of this court constitute final judgment because these orders were not reversed or modified on appeal. This conclusion is consistent with the remand order.

3. As noted above, this court concludes that defendant's motion to amend his Answer is untimely because judgment has already been entered and affirmed. Given the procedural posture of this case, this court has properly exercised its discretion by denying. *Reichert*, 197 Minn. 287, 290, 266 N.W. 855,857 (1936); Minn. R. Civ.P. 15.01. Justice simply does not require the granting of the relief requested by defendant.

ORDER

IT IS HEREBY ORDERED:

1. That Defendant's motion to amend his Answer to include a counter-claim for breach of fiduciary duty is DENIED.

2. That the prior orders of this court in this matter remain in full effect and binding on the parties.

Dated: October 15, 2009
BY THE COURT

David L. Mennis
District Court Judge

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08 (3).

Court of Appeals of Minnesota.
GLACIAL PLAINS COOPERATIVE,
Respondent,
v.
Gerald Wayne LINDGREN,
Appellant.

No. A10-185.
Aug. 24, 2010.

Swift County District Court, File No. 76-CV-07-237.
Amy J. Doll, Fluegel, Anderson, McLaughlin & Brutlag, Chtd., Morris, MN, for respondent.

Douglas D. Kluver, Nelson Oyen Torvik P.L.L.P., Montevideo, MN, for appellant.

Considered and decided by STAUBER, Presiding Judge; LANSING, Judge; and MUEHLBERG, Judge.*

UNPUBLISHED OPINION

LANSING, Judge.

*1 In this appeal after remand in a breach-of-contract case governed by the Uniform Commercial Code, Gerald Lindgren challenges the district

*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

court's decision confirming breach-of-contract damages, assessing attorneys' fees, and denying Lindgren's motion to amend his answer to add a counterclaim. Because the record does not present a genuine issue of material fact on either the breach of contract or the attorneys' fees, and because the district court acted within its discretion by denying the motion to amend the pleadings, we affirm.

FACTS

Gerald Lindgren is a farmer who entered into a series of oral contracts to sell grain to Glacial Plains Cooperative. Glacial Plains sued Lindgren after he failed to perform on two of the contracts, and Lindgren, acting *pro se*, asserted a defense under the statute-of-frauds provision included in the sales section of Minnesota's Uniform Commercial Code (UCC), Minn.Stat. §§ 336.2-101 to .2-725 (2008).

Glacial Plains moved for summary judgment, and the district court granted the motion. The district court rejected Lindgren's statute-of-frauds defense, finding, as a matter of law, that Lindgren was a merchant and that the oral agreements were therefore enforceable as reflected in confirmatory memoranda that Lindgren had failed to object to within ten days. See Minn.Stat. § 336.2-201(2) (defining merchant exception to UCC statute of frauds). The district court's finding that Lindgren was a merchant was necessary not only to its conclusion that the statute of frauds did not apply to bar Glacial Plains' claim, but also to its conclusion that attorney-fee obligations included in the confirmatory memoranda were enforceable additional terms to the oral agreements. See Minn.Stat. § 336.2-207(2) (providing circumstances under which

additional terms in confirmatory memoranda become incorporated into contract between merchants).

Lindgren appealed, focusing his challenge to the summary judgment on whether Glacial Plains' claims were barred by the statute of frauds. Lindgren argued that the district court erred by determining that he is a merchant under the UCC and, therefore, finding the oral agreements enforceable. In that first appeal, Lindgren did not appear to separately challenge the district court's imposition of attorneys' fees, although our resolution of whether Lindgren was a merchant would have been dispositive of that issue as well. *Glacial Plains Coop v. Lindgren*, 759 N.W.2d 661, 664-65 (Minn. App.2009) (*Glacial Plains I*).

We affirmed the district court's determination that the UCC statute of frauds did not provide a defense to enforcement of the contract, but did so applying the admissions exception, Minn.Stat. § 336.2-201(3)(b), rather than the merchant exception applied by the district court. *Glacial Plains I* explained that, "[w]here the making of a contract is admitted in court, no additional writing is necessary for protection against fraud, and the contract [between Lindgren and Glacial Plains is] enforceable notwithstanding the provisions of the statute of frauds" because "[Lindgren] has made such an admission...." 759 N.W.2d at 664. The opinion further concluded that Lindgren had admitted not only the existence but also the price and quantity terms of the oral grain contracts:

> *2 During his deposition and in his summary judgment papers, [Lindgren] acknowledged

> that he made two oral agreements in April 2006 for the sale of corn to be delivered in 2006 and 2007, and that he operated under the assumption that he was obligated under these agreements throughout the summer of 2006. He further admitted that he found the unsigned contracts, decided they were unenforceable, and stopped performing on the 2006 corn contract and never performed on the 2007 corn agreement. [Lindgren] also set forth the specific terms to which the parties orally agreed in April 2006 in his opposition to summary judgment and argued that any additional terms should not be part of any agreement. Based on these admissions by [Lindgren], we conclude that the admissions exception applies here, removing the agreement from the UCC statute of frauds.

Id. at 664-65. Based on our conclusion that the UCC statute of frauds did not provide a defense, we affirmed the district court's decision only in part, and remanded for further proceedings. *Id.* at 666.

On remand, the district court requested comment and direction from Lindgren and Glacial Plains on how to proceed. When they could not agree, the district court ordered mediation, which was unsuccessful. Lindgren, now represented by counsel, filed a motion to amend his answer to assert a breach-of-fiduciary-duty counterclaim, and the district court held a hearing. Following the hearing, the district court denied the motion to amend and reaffirmed its previous judgment, determining that Lindgren had provided no legal or factual basis for a fiduciary relationship between Lind-

gren and Glacial Plains and that the post-judgment motion to amend was untimely. The district court explained that "[b]ecause the judgments of this court regarding the damages to [Glacial Plains] for breach of contract and for attorney[s'] fees were not reversed or modified on appeal, the court finds that the prior judgments stand."

Lindgren again appeals, arguing that the district court failed to follow this court's directions on remand and asserting that the district court erred by failing to hold a trial on the breach-of-contract claims; enforcing the assessment of attorneys' fees; and denying his motion to amend his answer to add a counterclaim for breach of fiduciary duty.

DECISION

The primary argument advanced by Lindgren is that the district court's reaffirmance of its earlier judgment is precluded by the decision in *Glacial Plains I*. The district court's "duty on remand is to execute the mandate of the remanding court strictly according to its terms." *Duffey v. Duffey*, 432 N. W.2d 473, 476 (Minn.App.1988). When this court does "not give specific directions [on] how a district court should proceed on remand, the district court has the discretion to proceed in any manner consistent with our decision." *In re Margolis Revocable Trust*, 765 N.W.2d 919, 927 (Minn.App.2009). We review for abuse of discretion the district court's compliance in remand proceedings. *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn.2005).

**3* The remand instruction in *Glacial Plains I* states that "[w]e affirm" the district court's denial of Lindgren's statute-of-frauds defense and "remand

for further proceedings." 759 N.W.2d at 666. Because the remand instruction was general rather than specific, we determine whether the district court's course of proceeding on remand was inconsistent with the *Glacial Plains I* decision. Lindgren asserts that the decision implicitly required a trial, relying on this court's citation to an Eighth Circuit case for the proposition that "meeting the statute of frauds does not prove the terms of the contract but merely allows a fact-finder to determine the issue." Id. (citing *Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956, 964 (8th Cir.2006)). Glacial Plains asserts, and the district court concluded on remand, that the terms of the contracts already had been determined on summary judgment, and that these portions of the summary-judgment order were not altered on appeal.

We conclude that the district court's course of proceedings on remand was consistent with the decision in *Glacial Plains I* and was not an abuse of discretion. In concluding that the case fell within an exception to the UCC's statute of frauds, the *Glacial Plains I* decision reasoned that Lindgren had admitted not just the existence but also the essential terms of the oral grain contracts. 759 N.W.2d at 664-65. The attorney-fee provisions, however, were not part of Lindgren's admissions and were not addressed at oral argument in the first appeal. Because of this omission and because *Glacial Plains I* was relying on a different statute-of-frauds exception from the one relied on in the district court, the remand may have been aimed, in part, at giving Lindgren an opportunity to make any uncompleted arguments on the issue of attorneys' fees.

Whatever the general purpose for the remand in

Glacial Plains I, the procedural disposition does not alter the substantive effect of the decision. Meeting the merchant exception to the UCC's statute of frauds does not necessarily establish the terms of a contract. See Minn.Stat. § 336.2-201(2) (stating that meeting merchant exception satisfies requirements of UCC statute of frauds). But applying the admissions exception establishes both the exception and any admitted contract terms. See Minn.Stat. § 336.2-201(3)(b) (defining admission exception to UCC statute of frauds). And section 336.2-207(a) establishes additional terms when merchants are involved. Consequently, the admitted terms of the agreement were affirmed in *Glacial Plains I*, but whether Lindgren was a merchant for purposes of an assessment of attorneys' fees was not finally determined until remand. The *Melford* cite, which relates to the merchant exception rather than the admission exception, does not advance the clarity of the remand, but it does not change the holding of *Glacial Plains I*. Notably, although Lindgren argues that *Glacial Plains I* implied that a trial was necessary on remand, he has not pointed to any genuine issue of fact on the essential terms of the contracts. On this record, the district court's proceedings on remand were consistent with the decision in *Glacial Plains I* and not an abuse of the district court's discretion.

II

*4 Lindgren's second challenge is to the district court's imposition of attorneys' fees in accordance with a provision in the confirmatory memoranda sent by Glacial Plains. Generally, additional terms in a written confirmation of an oral agreement are

deemed "proposals for addition to the contract." Minn.Stat. § 336.2-207(2). When the parties to the contract are merchants, however, the additional terms become part of the contract subject to certain exceptions not argued in this case. Id.

Lindgren's argument appears to be limited to asserting that *Glacial Plains I* holds that he is not a merchant. This is not a correct reading of the decision. Because *Glacial Plains I* relied on the admissions exception to the UCC statute of frauds, the opinion did not address whether Lindgren was a merchant. See 759 N.W.2d at 665 (declining to address merchant exception). To the extent that Lindgren seeks to challenge the enforcement of additional terms under section 336.2-207, this argument was not raised in the previous appeal, despite argument about the merchant exception under 336.2-201. An appellant waives an issue by failing to raise it in appellate briefing. *Melina v. Chaplin*, 327 N. W.2d 19, 20 (Minn.1982). And, although "an appellant acting *pro se* is usually accorded some leeway in attempting to comply with court rules, he is still not relieved of the burden of, at least, adequately communicating to the court what it is he wants accomplished and by whom." *Carpenter v. Woodvale*, Inc., 400 N.W.2d 727, 729 (Minn.1987); cf. *Thorp Loan & Thrift Co. v. Morse*, 451 N.W.2d 361, 363 (Minn.App.1990) (rejecting *pro se* appellant's attempt to raise issues not raised below), review denied (Minn. Apr. 13, 1990). Lindgren's sole challenge in the first appeal was to the district court's application of the merchant exception to the UCC's statute of frauds. This court did not reach the issue of whether Lindgren was a merchant because we concluded that the case fell within the admissions

exception to the statue of frauds.

The issue is complicated, however, by the fact that both parties predominantly argued the merchant exception before the district court and on appeal to this court. We recognize that a ruling from this court in *Glacial Plains I* on whether Lindgren was a merchant could have resolved both the breach-of-contract issue and the enforceability of the attorney-fee provision, based on section 336.2-207. Under all of the circumstances, and particularly considering Lindgren's self-representation in the first appeal, we conclude that the interests of justice compel our review of the attorney-fee issue despite any waiver. See Minn. R. Civ.App. P. 103.04 (extending scope of review "as the interest of justice may require").

We now turn our attention to the merits of the attorney-fee challenge, addressing the issue not decided in *Glacial Plains I*, namely, whether the district court erred by determining, as a matter of law, that Lindgren was a merchant within the meaning of the UCC. In this respect, we are reviewing the district court's grant of summary judgment, determining whether there are any genuine issues of material fact and whether the district court erred in applying the law. See Minn. R. Civ. P. 56.03 (stating legal standard for grant of summary judgment); see also *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn.2002) (stating that appellate court independently reviews whether summary judgment is appropriate). We view the evidence in the light most favorable to the party against whom judgment has been granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993).

*5 A merchant is defined by the UCC as

> a person who deals in goods of the kind or otherwise by occupation holds out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by employment of an agent or broker or other intermediary who by occupation holds out as having such knowledge or skill. Minn.Stat. § 336.2-104(1).

Although neither the Minnesota Supreme Court nor this court has addressed the issue, relatively recent decisions from other state courts have concluded that a farmer may be a merchant within the meaning of the UCC. *E.g., Smith v. Gen. Mills, Inc.*, 968 P.2d 723, 727 (Mont.1998); *Colo.-Kan. Grain Co. v. Reifschneider*, 817 P.2d 637, 640 (Colo.Ct. App.1991); *Agrex, Inc. v. Schrant*, 379 N.W.2d 751, 754 (Neb.1986); *Nelson v. Union Equity Coop Exch.*, 548 S.W.2d 352, 355 (Tex.1977); *Rush Johnson Farms, Inc. v. Mo. Farmers Ass'n*, 555 S.W.2d 61, 64 (Mo.Ct.App.1977). These decisions reject the reasoning of an older line of authority suggesting that a farmer, as a "simple tiller of the soil," cannot be a merchant under the UCC. *Rush Johnson*, 555 S. W.2d at 64. The more recent trend observes that

> the cases which hold that farmers may be merchants reflect on the fact that today's farmer is involved in far more than simply planting and harvesting crops. Indeed, many farmers possess an extensive knowledge and sophistication regarding the purchase and sale of crops on the various agricultural mar-

> kets. Often, they are more aptly described as agri-businessmen.

Colo.-Kan. Grain Co., 817 P.2d at 640; see also *Rush Johnson*, 555 S.W.2d at 64 (explaining that "the marketing of a crop is certainly as important as the raising of it"). We are persuaded by the more recent line of caselaw and likewise conclude that a farmer can be a merchant under the UCC for some purposes.

"The status of a [particular] farmer as a merchant is typically a question for the trier of fact, and the issue becomes one of law only if reasonable minds could not draw different conclusions from the facts." *Colo.-Kan. Grain Co.*, 817 P.2d at 640; see also *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn.2006) (explaining that party opposing summary judgment must present "sufficient evidence to permit reasonable persons to draw different conclusions" (emphasis added)). Factors relevant to determining whether a farmer is a merchant may include:

> (1) the length of time the farmer has been engaged in the practice of selling his product to the marketers of his product; (2) the degree of business acumen shown by the farmer in his dealings with other parties; (3) the farmer's awareness of the operation and existence of farm markets; and (4) the farmer's past experience with or knowledge of the customs and practices which are unique to the particular marketing of the product which he sells.

Colo.-Kan. Grain Co., 817 P.2d at 640-41.

*6 The facts relevant to the merchant determination in this case are not in dispute. Lindgren has been running his own farming operation since 1973. He owns about 836 acres of land, on which he grows soybeans and corn. Lindgren grew up on a farm and took agricultural and business classes while in college. He makes all of the marketing decisions in the disposition of his crops. Over the years, Lindgren has chosen to sell his crops to a variety of buyers, including Cenex Harvest States, Cargill, United Farmers Elevator, and Glacial Plains. Lindgren has experience with both cash sales and futures contracts, and also has the capacity to store his crops for future sale.

On these facts, we conclude that the district court did not err by determining that Lindgren was a merchant as a matter of law. See, *e.g.*, *Smith*, 968 P.2d at 727 (affirming determination that farmer was merchant as matter of law based on years of experience with grain marketing and familiarity with "all facets of marketing the grain, including knowledge of the product, how to produce it, how to store it, where and how to sell it, and how to negotiate the best terms possible for its disposition"); *Colo.-Kan. Grain Co.*, 817 P.2d at 640 (holding that defendant's "twenty years of experience in selling corn establishes that he is a 'person who deals in goods of the kind' "); *Rush Johnson*, 555 S.W.2d at 65 (affirming merchant determination for "experienced farmer who was well conversant with the marketing of his bean crop").

Lindgren argues that he cannot be considered a merchant because he does not buy grain for trade

and thus cannot be a dealer in grain, referring to language in the UCC defining a merchant as a "person who deals in goods of the kind ... involved in the transaction." Minn.Stat. § 336.2-104(1) (emphasis added). Lindgren contends that the word "deals" means to buy and sell, not to grow and sell. We reject this constrictive definition, which would limit merchants to brokers and retailers and exclude any sellers who manufacture their own product. See *Nelson*, 548 S.W.2d at 355-56 (concluding that raising and selling crops fell within plain meaning of term "deal"); *Colo.-Kan. Grain Co.*, 817 P.2d at 640 (explaining that "farmer who regularly sells his crops is a person who deals in goods of that kind").

Notably, the definition of merchant extends not only to one who deals in the goods, but one who "by occupation holds out as having knowledge or skill peculiar to the practices or goods involved in the transaction." Minn.Stat. § 336.2-104(1). This definitional extension focuses on a party's "occupation, and not on whether he made any representations or on his actual knowledge or skill." *Nelson*, 548 S.W.2d at 356 (emphasis added). The uncontroverted evidence in this case reflects Lindgren's long experience as a farmer and marketer of his own crops. Thus, even were we to accept Lindgren's narrow definition of the term "deals," we would nevertheless conclude that the district court did not err by determining that Lindgren is a merchant within the meaning of the UCC.

*7 Lindgren's admissions establish an enforceable contract. His status as a merchant establishes the attorney-fee terms of the contract, because those terms were included in confirmatory memoranda to

which Lindgren did not object. Accordingly, the district court did not err by ordering Glacial Plains to pay attorneys' fees.

III

Lindgren's final challenge is to the district court's denial of his motion to amend his answer to add a counterclaim for breach of fiduciary duty. An answer may be amended once as a matter of course within twenty days of when it is served. Minn. R. Civ. P. 15.01. Thereafter, the answer can be amended only by leave of court, which "shall be freely given when justice so requires." *Id.*; see also *Nw. Nat'l Bank of Minneapolis v. Shuster*, 388 N. W.2d 370, 372 (Minn.1986) (construing Minn. R. Civ. P. 13.05 and 13.06 to require leave of court under rule 15.01 to assert after-acquired or omitted counterclaim). We review an order denying a motion to amend a pleading for abuse of discretion. *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn.App.2007), aff'd, 742 N.W.2d 660 (Minn.2007).

A motion to amend may properly be denied based on the stage of the proceedings, the potential for substantial delay, or the absence of a viable claim in the proposed amendment. *Envall v. Ind. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. App.1987), review denied (Minn. Mar. 25, 1987). Additionally, "a party must act with due diligence in attempting to amend." *Hempel v. Creek House Trust*, 743 N.W.2d 305, 313 (Minn.App.2007). The district court determined that Lindgren's motion to amend was both untimely, because it was filed after judgment had been entered, and futile, because no factual or legal basis supports the assertion of a fiduciary relationship. We conclude that the district

court properly exercised its discretion to deny Lindgren's motion to amend on these grounds. See, *e.g.*, *Metag v. K-Mart Corp.*, 385 N.W.2d 864, 866 (Minn. App.1986) (affirming denial of motion to amend brought almost four years after commencing action and six months after pretrial conference because court "undoubtedly would have had to reschedule the trial in order to allow respondent to prepare"), review denied (Minn. June 23, 1986); see also *Shema v. Thorpe Bros.*, 240 Minn. 459, 467, 62 N. W.2d 86, 91 (1953) (stating that no fiduciary relationship arises when parties are dealing at arm's length).

Affirmed.

Minn.App.,2010.
Glacial Plains Co-op. v. Lindgren
Not Reported in N.W.2d, 2010 WL 3307077
(Minn.App.)

STATE OF MINNESOTA
IN SUPREME COURT
A10-185

Glacial Plains Cooperative,
Respondent,

vs.

Gerald Wayne Lindgren
Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Gerald Wayne Lindgren for further review be, and the same is, denied.

Dated: November 16, 2010

BY THE COURT:

Lorie S. Gildea
Chief Justice